NO. 80-1699

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR.MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Counter-Statement of the Case

Allen Scott has been confined in the Forensic Unit of Trenton Psychiatric Hospital since 1955. Although he has had several hearings concerning his mental condition his most recent hearing held on June 11, 1980 and July 2, 1980 is presently on appeal to the Appellate Division of the Superior Court of New Jersey, which appeal alleges error in the ruling of the lower court which held that since Allen Scott was found to be psychotic he must therefore be dangerous.[1]

In this case, plaintiff seeks monetary, declaratory, injunctive, and habeas corpus relief against various State administrative officials for unconstitutional conditions[2] and inadequate psychiatric and medical treatment during his period of confinement as well as his release from confinement for the failure to provide him with the aforesaid.

Although respondent acknowledges the statement of his own expert, Dr. Sadoff, as set forth on page 4 of the brief in support of this Petition, Dr. Sadoff further testified that based upon the absence of any violent or dangerous conduct by Allen Scott since 1955 it was not possible to state he presented an imminent danger of harm to himself,

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[1] The basis for this appeal is grounded upon testimony at the hearing that merely because one's psychotic does not automatically mean one's also dangerous and the fact that since Allen Scott's confinement in 1955 he has not once committed an overt act of violence of any nature whatsoever.

[2] Interestingly, the Petitioner does not set forth the award of damages or the injunctive relief ordered on this claim as an issue to be presented in this Petition for a Writ of Certiorari, nor does Petitioner offer any suggestions as to how this Court can attempt to separate the award between this issue and the right to treatment issue.

others, or to property (IITS, 13-16; T17, 1-24; T24, 20-24),[3] which is the test employed by New Jersey laws to justify his continued commitment.[4]

Dr. Musikoff, defendant's expert witness also admitted that one suffering with Allen Scott's diagnosis does not always have to be dangerous (IIIT113, 15-16).

Although Petitioner has accurately referred to trial testimony on page 5 of their brief such references neglect to set forth Dr. Sadoff's clarification that if their had been no corrective treament or individualized treatment plan that such would constitute harm in a medical sense (II27, 7-12), and although Dr. Sadoff said Scott's situation was typical of persons in a state institution for the criminally insane he said it was unfortunately so (IIT22, 17-22), but that typical did not mean medically effective (II26, 2-6).

Dr. Musikoff, the defendant's own expert witness even admitted that treatment was not adequate to ensure the optimum chance for a cure or improvement in Allen Scott's condition (IIIT119, 18-24).

Although Dr. Sadoff testified as indicated on page 5 of Petitioners' brief that Allen Scott had refused some medi-

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[3] The six transcripts for the five days of trial will be identified as follows:

I May 31, 1979
II June 1, 1979
III June 6, 1979
IV June 7, 1979
V June 13, 1979 (summations and charge to jury)
IV June 13, 1979 (verdict of jury)

Thus, for example, IT112-20 refers to the transcript for May 13, 1979, at page 112, line 20.

[4] *State* v. *Krol*, 68 N.J. 263, 344 A.2d 289 (1975).

cation he clearly stated that the type of treatment Allen Scott needed to even improve, much less be cured of his condition, included psychotherapy, group psychotherapy on a weekly basis, environmental and reality therapy on a daily basis, and occupational or educational therapy on a daily basis (HT10, 13-22; T14, 1-19, 21-25; T15, 5-10).

Regarding Allen Scott's purported refusal of available treatment can not be viewed properly without considering what such treatment actually consisted of. Initially, no one at the institution ever worked with Allen Scott on a regular basis (T74, 19) and neither a psychiatrist nor a psychologist ever saw him on a regular basis since his institutionalization over two decades ago (T76, 13-19). Although a treatment team had been recently established, the evidence at trial revealed that this team only met with Allen Scott once a month and then only for ten to fifteen minutes, which meeting was not even for purposes of providing counseling (HHT122, 5-18; T124, 20-23). Even after Allen Scott had been confined for ten years one doctor stated that since he has been ill for the last ten years there is no reason to even bother trying to treat him (HHT18, 13-16), notwithstanding the fact that expert testimony showed that the optimum chance for success in curing or improving mental illness is in the early period of institutionalization (HT12, 5-12; HHT117, 9-17; T119, 18-24; HT15, 21-25). In fact, no psychiatrist had even had a counseling session with Allen Scott for almost one and one half years before trial (HHT126, 8-11) which was and is antitherapeutic (HT19, 8-17).

Since this Petition has not raised as an issue to be presented the jury award or Court approval of the finding that the conditions of confinement were unconstitutional there is no need to set forth the lengthly list of those conditions. Suffice it to say that the jury found such condi-

tions violated the constitution (Appendix B, page 53a of Petitioner's brief).

After retiring to deliberate the foregoing evidence as to the conditions and lack of treatment the jury returned an award in favor of Allen Scott in the amount of $15,000.00 in compensatory damages and $10,000.00 in punitive damages.

Although upon consideration of the post-trial motions referred to at page 6 of Petitioners' brief, the District Court vacated the award of punitive damages and reduced the compensatory damage award to $1.00, the Court nevertheless found that:

> ". . . based upon the charges given and the evidence adduced, there was a sufficient factual basis for a jury finding that plaintiff is entitled to some compensatory award." (Appendix B, page 53a of Petitioner's brief),

and the Court further observed such a right to treatment was affirmatively imposed upon the State of New Jersey pursuant to its own statutes[5] and that the lack of staff or facilities are not satisfactory arguments for the denial thereof[6] (Appendix B, page 53a of Petitioner's brief).

The remainder of Petitioners' statement of the case as to procedurally how this case moved from the trial Court to this Court is correct.

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[5] N.J.S.A.30:4-24.1.

[6] The District Court cited the New Jersey cases of *State* v. *Carter*, 64 N.J. 382, 316 A.2d 449 (1974) and *State in Interest of R.G.W.*, 145 N.J. Super. 167, 366 A.2d 1375 (1976).

Reasons for Not Granting the Writ

The most significant reason why this Writ need not and should not be granted lies in the fact that the decision below regarding a right to treatment in the least restrictive setting was based in part, and could stand alone as the sole justification for the decision below, on the very statutes of the State of New Jersey. The Court below acknowledged that N.J.S.A.30:4-24.2(e)(2) entitled a mental patient to be committed to the least restrictive conditions necessary to achieve the purposes of treatment.

Further, the decision of the Court below can not be fairly said to conflict with the decisions of other Circuits. Nor is it fair to represent that there is no basis in the decisions of this Court considering this Court's decision in *Shelton* v. *Tucker*, 364 U.S. 479 (1960) wherein this Court held that legitimate governmental purposes can not be pursued in such a way as to eliminate substantial personal liberties when the same result can be achieved by more narrow means.

Again, this case is not likely to have an extremely detrimental effect on the operation of public mental health facilities throughout the United States since the facts herein are peculiar to Allen Scott alone (this suit was not brought as a class action).

Contrary to Petitioners' contentions the Court below has not ignored this Court's prior decisions in *O'Connor* v. *Donaldson*, 422 US. 563 (1973), *Wood* v. *Strickland*, 420 U.S. 308 (1975) and *Procunier* v. *Navarette*, 434 U.S. 555 (1978). In *O'Connor* v. *Donaldson*, Supra, this Court at page 577 gives the 5th Circuit direction by stating that pursuant to *Wood* v. *Strickland*, Supra, the relevant question for the jury to determine is whether Superintendent O'Connor knew or reasonably should have known of the facts alleging constitutional violations.

The Court below (Appendix A, page 23a of Petitioner's brief) clearly acknowledges it is following O'Connor and even more clearly the Court below notes that the jury was charged that they could only find liability if they found the defendants below had actual knowledge which could be established by direct knowledge or by indirect knowledge in the sense that these defendants should have reasonably known (Appendix A, page 20a of Petitioner's brief).

There was ample evidence for the jury's finding as noted by the District Court Judge in his opinion (Appendix B, pages 52a, 53a of Petitioner's brief). Both Drs. Weinberg and Plante visited Allen Scott's place of confinement on numerous occasions, some of those visits being for the purpose of attending Allen Scott's treatment team meetings (IT122, 8-17; T121, 22-25; T122, 1-3). Dr. Weinberg even signed an affidavit that he was Allen Scott's custodian and that he was completely aware of the treatment being given to Allen Scott (IIT?1, 18-21). There was also evidence of Commissioner Ann Klein's presence at Allen Scott's place of confinement (IT121, 10-18) and that she was aware of his complaints (IIT26, 18-25; T27, 1-7; T29, 1-24)

As Commissioner, Ann Klein was charged with knowledge pursuant to her statutory duties as set forth in N.J.S.A.30:1-15.1, and even had a statutory right of action against the medical director[8], her own employee, to mandate remedies of any environmental or clinical inadequacies. Nor could any of these defendants be said to be unaware of the loss of accreditation by the Joint Commission on the Accreditation of Hospitals both as a result of the conditions which did not meet minimal stand-

[8] Both Drs. Plante and Weinberg had held this position.

ards as well as for the lack of sufficient treatment (III T133, 21-23; T134, 11-22).

Since it is clear the Court below followed the directions set forth by *O'Connor* v. *Donaldson*, Supra, and *Wood* v. *Strickland*, Supra, and that the jury had ample evidence upon which to still find liability, the actual intent of the defendants' Petition for a Writ of Certiorari becomes apparent, and stated simply and candidly, these defendants' unhappy with the determination of the jury, the fact finders below, now seek to have this Court substitute their own judgment for that of the jury's, which respondent respectfully suggests is totally inappropriate.

The jury was instructed as to the immunity of these officials under a good faith defense (Appendix A, pages 21a and 22a of Petitioner's brief) and the jury rejected this defense because they determined these defendants' either had knowledge or they should have reasonably known. This is all that *Wood* v. *Strickland*, Supra, required. At page 314 of this Court's decision in *Wood* v. *Strickland*, Supra, this Court agreed with the Court of Appeals in that case which found that the District Court in that case had erred in instructing the jury they needed to find specific intent to harm wrongfully and held that it need only be established that in light of all the circumstances the defendant did not act in good faith.

Contrary to Petitioners' brief, the decision below is not likely to cause the State of New Jersey to discharge all of its dangerous mentally ill. This is an exaggeration and an attempt to prevail upon this Petition by attempting to frighten this Court into granting the Petition for a Writ of Certiorari. Further, the Petitioners' citing of *Welsch* v. *Likins*, 550 F.2d 1122 (8th Cir. 1977) as support for this proposition seems inappropriate since the Court therein suggested alternatives to such drastic ac-

tion. Therein, the 8th Circuit was also told of the enormous costs to the State of Minnesota if forced to correct certain deficiencies in the institution involved. Nevertheless that Court referring to the words of Mr. Justice Blackmun, then an 8th Circuit Judge, stated that "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . ."[9] the 8th Circuit stated that the closing of Minnesota's institutions would be an extreme alternative and that a lesser alternative could be the reduction in the number of such institutions or possibly even to reduce the populations of the institutions to a point where they would be adequately staffed and adequate treatment could be furnished.

Clearly, this Court as well as others have held that no policy of judicial restraint shall encompass a failure to recognize and correct valid constitutional claims. *Procunier* v. *Martinez*, 416 U.S. 468 (1974); *Rouse* v. *Cameron*, 373 F. Supp. 451 (D.C. Cir. 1967); *Inmates of Boy's Training School* v. *Affleck*, 364 F. Supp. 1354 (D.R.I. 1977); *State in the Interest of R.G.W.*, supra; and *Davis* v. *Balson*, 461 F. Supp. 842 (N.D. Ohio W.D. 1978).

In *Davis* v. *Balson*, supra, the Court held it clearly within their province to order both an increase in staff and realignment of staff when necessary to address constitutional deprivations.

Perhaps of greater interest is the case of *State in the Interest of R.G.W.*, supra, since as previously discussed the State of New Jersey has by statute provided for a right to treatment in the least restrictive setting.

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[9] *Jackson* v. *Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

The Court herein found that there was an absolute and immediate right and duty to implement the right to treatment and if necessary to even direct an allocation of monies to that end and thus ordered the State of New Jersey to expend the necessary funds to effect the placement and maintenance of the patient even if it meant a private as opposed to a public institution and even if it had to be in another state.

It is important to keep in mind that this case still involves only one individual and certainly does not qualify as one of exceptional public importance. This is all the more true considering that many of the facts of this case are preculiar to Allen Scott. Further, only a very small percentage of the population of this country is confined in public institutions for the mentally dangerous ill and only a small percentage of any state budget is ever appropriated for these institutions as compared to the overall budgets of our fifty states. Thus it can hardly be said this case presents any particularly exceptional or important public issue which would justify this Court in granting this Petition for a Writ of Certiorari.

A. Certiorari need not be granted to resolve the issue of a constitutional right to treatment since Allen Scott had a statutory right to treatment under the statutes of the State of New Jersey.

The statutes of the State of New Jersey, irrespective of the United States Constitution, gave Allen Scott a right to treatment in the least restrictive setting. N.J.S.A. 30:4-24.2,e(2).

Petitioners' refer in their brief that other than *Romeo* v. *Youngberg,* No. 78-1982 (3rd Cir. 1980) the Court be-

low did not cite any other cases in support is suggestive of the non existence of any prior cases supporting such a holding. However, this is not so, for there exists a long line of cases finding the existence of such a right to treatment. *State* v. *Carter*, supra; *State in the Interest of R.G.W.*, supra; *Nelsen* v. *Heyne*, 491 F.2d 352 (7th Cir. 1974); *Newman* v. *State of Alabama*, 503 F.2d 1320 (5th Cir. 1974); *Rouse* v. *Cameron*, supra; *Tribby* v. *Cameron*, 379 F.2d 104 (D.C. Cir. 1967); *U.S. ex rel Von Woldersdorf* v. *Johnston*, 317 F. Supp. 66 (S.D. N.Y. 1970); *Lessard* v. *Schmidt*, 395 F. Supp. 1078 (E.D. Wisc. 1972); *Welsh* v. *Likins*, supra.

Petitioners' make no attempt to represent that these decisions are in conflict with any other decisions or that any other decisions are in conflict with the decision of the Court below.

In fact, the cases cited by Petitioners' as support for their position actually support and are in unison with the decision below.

Petitioners' cite a federal district court case from New York, *Patton* v. *Dumpson*, 425 F. Supp. 621 (S.D.N.Y. 1977) for the proposition that the failure to properly treat one single person does not allege a violation of the constitutional right to treatment. That very statement acknowledges the existence of a constitutional right to treatment. Further, if we read beyond the point heads of the case we see that what that Court held was that the Complaint filed therein should be dismissed for its failure to allege what treatment was denied to the plaintiff. Rather than appeal the dismissal of the Complaint the plaintiff refiled again and since he was retarded he filed his new Complaint under the Rehabilitation Act of 1973. *Patton* v. *Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980).

Petitioners' also cite a federal district Court case from Ohio, *Rone* v. *Fireman*, 473 F. Supp. 92 (N.D. Oh. 1979). However even that Court said,

> "Nor is the Court powerless to determine whether adequate treatment is present . . . It can not reasonably be said that the determination of what constitutes minimally adequate treatment is beyond judicial competence." (at page 119).

The Court recognized at page 119 that treatment is required and that the standard of treatment must be defined by the facts.

The Court in *Rone* found that there are certain standards generally advanced by mental health professionals as essential for minimally adequate treatment: (1) a humane and therapeutic environment (which the jury in the case at bar found that Scott did not have the benefit of and as previously referred to the institution lost its accreditation due to its environment); (2) a qualified staff in sufficient numbers (again in Scott the Joint Commission on the Accreditation of Hospitals found this didn't exist either); (3) a individual treatment plan. The Court in *Rone* found that there was a failure to provide minimally adequate treatment and proceeded to order specific reforms.

The Petitioners' further cite from a footnote from yet another federal district Court case from New York, *Woe* v. *Mathews*, 408 S. Supp. 419 (E.D.N.Y. 1976) pointing out the difficulties in these types of cases. Yet many of the cases upon which our Courts are called upon to decide present difficult questions. Even the Court in *Woe* acknowledges that Courts have found there exists a right to a humane and safe living environment and merely said that such issues can't be determined here at this time upon the posture of this case which is here only upon a motion to dismiss.

In sum, notwithstanding Allen Scott's statutory right to treatment under the laws of the State of New Jersey, Petitioners have failed to cite any cases contrary to the decision of the Court below and they have failed to show that the facts upon which the Scott jury relied were so similar to every other individual so confined in these fifty states that the decision below warranted the need for this Court to grant Certiorari because of the purported far reaching effect.

B. Certiorari need not be granted since the Court of Appeals neither misinterpreted nor eliminated the qualified good faith immunity of state officials as established by this Court's decisions. To the contrary, such rulings were followed.

Previously, under the heading "Reasons For Not Granting Certiorari," respondent has already explained that the Court below did not eliminate the qualified good faith immunity of state officials as set forth in *O'Connor* v. *Donaldson*, supra, and *Wood* v. *Strickland*, supra, and in fact, actually found the intent of these decisions were followed as evidenced by the jury instructions given below. Therefore, respondent will attempt to limit his discussion hereunder to the additional contentions Petitioners' set forth under this point of the brief.

Petitioners' contend the Court below refused to accept that the defendants' were entitled to the good faith immunity set forth in *O'Connor* v. *Donaldson*, supra. The weakness of this argument lies in the inference that since defendants' were found liable the good faith immunity of *O'Connor* was not followed. Petitioners' argument fails to recognize that this Court in *O'Connor* never said that this immunity was absolute, but rather stated it was a qualified immunity. The jury in Scott was so charged. The

jury was charged that these defendants', in order to be liable, must have known or reasonably should have known of the deprivation of Scott's rights. The jury determined the defendants' had not shown that they acted in good faith and as previously set forth in this brief there was ample evidence from which the jury could so find. Clearly it can not be said nor do Petitioners' contend that such a determination was not one to be made by the jury or that it was not within the province of the jury.

Petitioners' even argue against the very cases cited in their brief. Clearly, *O'Connor* v. *Donaldson,* supra, and *Wood* v. *Strickland,* supra, stand for the proposition that there can be liability for a supervisory official if the standards of these cases are met. Yet even though Petitioners' cite these cases Petitioners' now state that the law has clearly established such officials may only be liable if personally involved and cite as support the case of *Donaldson* v. *Hovance,* 473 F. Supp. 602 (E.D.Pa. 1979). The citing of this case is yet another glaring example of Petitioners' reaching out for anything they can find. This case involved a suit against a state trooper and his supervisor based upon an excessive use of force used by the trooper in making the arrest. The Court found that since the trooper's supervisor neither orderd the trooper to use excessive force; since the supervisor didn't know the trooper was going to use excessive force; and since there was nothing in the trooper's background to indicate he might use excessive force there was no basis for finding the supervisor knew or reasonably should have known the trooper would use excessive force. The Court clearly indicated however, that had the supervisor known or had there been something in the trooper's record the supervisor could surely be liable.

Respondent is in complete agreement with this reasoning. In the case at bar the jury, as previously referred to

hereinabove, was told they could not find these defendants' liable unless they found that they personally knew or should have known of the deprivation of Allen Scott's rights. And the jury so found and as referred to hereinabove there was ample evidence from which they easily could justify so finding.

The same is the case in the other cites of the Petitioners' *Hampton* v. *Holmesburg Prison Officials*, 546 F.2d 1077 (3rd Cir. 1976) and *Coggins* v. *McQueen*, 447 F. Supp. 960 (E.D.Pa. 1978). Each of these cases clearly establishes that if the evidence shows that state officials knew or reasonably should have known of the deprivation of the plaintiff's rights liability can be found.

Petitioners' contention that there was no basis for the Court below to vacate the ruling of the district court reducing the damages to $1.00 is without merit and seems to infer that without actual physical injuries the sum of $1.00 is all that can be awarded. To so contend flies in the face of and is in conflict with this Court's own decision in *Carey* v. *Piphus*, 435 U.S. 247 (1978) holding that mental and emotional distress caused by a denial of constitutional rights is compensable in 1983 actions. Surely, the fixing of a monetary value for pain, suffering, and mental anguish is a highly subjective decision and is within the province of the jury. *Chuy* v. *Philadelphia Eagles Football Club*, 595 F.2d 1265 (3rd Cir. 1979); *Drayton* v. *Jiffee Chemical Corporation*, 591 F.2d 352 (6th Cir. 1978); *Gregory* v. *South Hills Movers, Inc.*, 477 F. Supp. 484 (N.D.Pa. 1979).

Petitioners' contention that the Eleventh Amendment bars a recovery in this case based on earlier decisions of this Court fails to recognize not only some of the later decisions of this Court but certain decisions directly dealing with discussions of the interplay between the Eleventh and Fourteenth Amendments to the United States Consti-

tution. *Scheuer* v. *Rhodes*, 416 U.S. 233 (1978); *Hutto* v. *Finney*, 98 S. Ct. 2565 (1978); *Fitzpatrick* v. *Bistzek*, 96 S. Ct. 2666 (1976).

This Court stated in *Scheuer* v. *Rhodes*, supra, that the Eleventh Amendment will not shield a state official who deprives an individual of his constitutional rights. The reasoning supporting this determination is sound. Were it not so then 1983 actions would be drained of meaning and the actions of state officials would in effect, be clothed with the character of being supreme and unchangeable edicts which would be capable of overriding all conflicting rights our citizens enjoy, and which conduct would then be unreviewable by the judicial branch of our government thereby having the potential effect of making a state official's fiat the supreme law of the land.

This Court, has also found that the Eleventh Amendment must yield to the superior rights contained within the Fourteenth Amendment. *Hutto* v. *Finney*, supra; *Fitzpatrick* v. *Bistzek*, supra. These cases deal with the relationship between the Eleventh and Fourteenth Amendments, but the case of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), cited by Petitioners' does not address itself to the relationship of these two amendments.

In sum, the Court below has not eliminated the qualified good faith immunity of state officials but rather, has followed the decisions of this Court.

CONCLUSION

For the froegoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should not be granted.

Respectfully submitted,

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